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Legislating Morality

by GRANT BABCOCK on JULY 26, 2011 · 1 COMMENT
in CULTURE, ODDS & ENDS, ZEITGEIST

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I recently watched the Cato Institute's interns take on the Heritage Foundation's interns in a debate on conservative vs. libertarian philosophy. You can watch the debate [online at Cato's website](#). Many aspects of the conservative/libertarian conflict were discussed, but one point, I think, deserves special consideration. A key point of difference between conservatives and libertarians is the matter of "legislating morality."

We've seen this debate before — the libertarians say that the conservatives' project of trying to legislate on drug use or sexual ethics is meddlesome and unwarranted if not downright dangerous. The conservatives retort that libertarians want to deprive the law, nay, society itself, of any ethical character or foundation. The team from Cato was far too quick to concede this point, saying that rights were logically prior to ethics, the implication being that rights claims are not ethical claims. This is not entirely accurate, illustrating a fundamental misunderstanding many libertarians have about libertarianism.

This misunderstanding is that libertarianism implies a separation of law and ethics. Certainly, there are some libertarians who advocate this. They tend to take a Hayekian approach to law, arguing that the American legal system is derived from English Common Law, an example of spontaneous order without a designer and not reflecting any certain conception of justice. John Hasnas would be a modern example of someone who thinks this way. However, you don't necessarily need to believe the law ought to be completely amoral to be a libertarian, and I will argue that there are good reasons to believe law is an ethical matter.

Somewhat ironically, those libertarians who do believe in a strict separation of law and ethics are that much closer in philosophy to conservatives like Edmund Burke. Both argue that we ought to preserve existing institutions even if we do not have a philosophical proof that they are good. The relevant criterion is whether the institution is "time-tested," whether it "works." This belief is in direct tension with the moralistic paternalism conservatives argue humans require of government. This becomes apparent when we ask what it means to pass or fail the test of time, to "work." Why do some institutions persist, and others wither away? The only answers I can see are (1) utilitarian superiority, (2) divine guidance, (3) some other reason *lacking ethical significance*.

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In case 1, the conservative must be prepared to embrace a utilitarian view of ethics. There may be conservatives prepared to embrace this option, and I would answer them as I would any other utilitarian: interpersonal utility comparisons are conceptually incoherent and therefore cannot serve as the basis for an ethical system.

Second, it could be that time-tested institutions are superior to new ones because the historical processes yielding them are guided by a god. But a divine justification for the institution of government has failed the test of time, and is therefore only open to the conservative if she is prepared to display a startling degree of cognitive dissonance.

The third option, when applied to the institution of the law, leads directly to the conclusion that we have the laws we have not because they are good but for some other reason. This is the very “baselessness” conservatives accuse some libertarians of exhibiting.

While it is interesting to point out that conservatives have no legs of their own to stand on, the bigger problem is that some libertarians think they must abandon an ethical basis for the law because of the incorrect conservative foundation. Suppose libertarians and conservatives agree on some set of acts that are unethical. Call the set S, and note that I don't think libertarians and conservatives actually *do* agree on the contents of S; this is just for the sake of argument. It does not follow that everything item in S should be outlawed. It doesn't even follow that *anything* in S should be outlawed. To decide what subset of S should be considered a matter for government, we need some conception of what the limits on government authority are. It may be that certain transgressions simply do not fall within government's purview. Such limits might be statutorily determined (“Congress shall make no law...”) or they might be non-statutory ethical strictures.

This last point is the crux of the matter. Saying, for example, that the government should not be allowed to ban drugs, *is* basing the law on a code of ethics. Outlining an entire ethical system would be beyond the scope of a blog post, but I can present several brief considerations that make it seem plausible that the law should only deal with protecting people from force and fraud (i.e., invasions against one's property in one's body and in one's possessions).

Locality and Expertise

Certain decisions about people's lives should be made by close friends and family exclusively because of the nature of the issues. For example, drug use can have ripple effects; people can become disengaged from their families and their community responsibilities. But effectively dealing with the problem means employing tactics like interventions, therapy, and potentially medical treatment. Criminalizing drug use hinders, rather than helps, this process.

Public Choice

Just because a market failure or a failure by values-related institutions exists does not mean regulation is the appropriate response. The incentive structures inherent in government mean such regulatory bodies will come to act not for the good of the general public but for the good of the regulated persons or companies. For example, one might disapprove of gambling but recognize that a regulatory agency for gambling would, over time, tend to represent the interests of big casinos (or of the government, if the government runs a lottery).

Another example would be the censorship of sexually explicit material. This pushes producers of such materials to look for new and different things to sexualize in new and different ways. For people who find such things objectionable, the side effects of censorship can be worse than what they were attempting to eliminate.

Proportionality

Asserting that something should be illegal is asserting that if someone engages in that activity, armed agents should come to their homes and take them away from their family. This seems

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reasonable if the person in question is engaging in violent activities; not so reasonable if they're selling liquor on a Sunday. When looking for a line as to when a violent response is appropriate, whether or not the offense involves violence is as good a criterion as I can imagine.

Libertarians are cognizant of these problems, and so they understand that attempts to compel complete virtue through government are themselves unethical. This conclusion is not new to the world. Christianity teaches that sin is predicated on free will; Kant argued that an act could only be good if undertaken for the correct reasons. By seeking to mandate conformity, conservatives separate from ethical behavior the virtue they so prize.

The ethics of law must not only be judged by the ends of legislators, but also by the means of enactment: government force. By this standard, the conservative program fails.



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Misha July 26, 2011 at 5:37 pm



The question that I feel I should ask myself about any piece of criminal legislation is; "Would I, personally, put a bullet through the head of a person who committed this act?"

If the answer is no, then that is a law that I should not support.

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